APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED AUGUST 8, 2005

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No: 05-50510
1:04cv767 LY

CHRISTINE LEMP, Individually, and as Representative of the Estate of Captain James Lemp, Deceased and as Next Friend of Matthew Lemp and Sarah Lemp, Minor Children

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA

Defendant - Appellee

Appeal from the United States District Court for the Western District of Texas, Austin

---

Before JOLLY, DAVIS, and OWEN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellee's unopposed motion for summary affirmance is GRANTED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION DATED FEBRUARY 28, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CAUSE NO. A-04-767-LY

CHRISTINA LEMP, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF CAPTAIN JAMES LEMP, DECEASED AND AS NEXT FRIEND OF MATTHEW LEMP AND SARAH LEMP, MINOR CHILDREN,

PLAINTIFFS,

V.

UNITED STATES OF AMERICA,

DEFENDANT.

ORDER

Before the Court are Defendant United States of America's Motion to Dismiss pursuant to Rule 12(b)(1) and (b)(6) of the Federal Rules of Civil Procedure filed January 27, 2005 (Doc. #2); and Plaintiffs' Response to Defendant's Motion to Dismiss filed February 24, 2005 (Doc. #5). Having considered the motion and response, the Court is of the opinion that the motion should be granted based upon the reasoning to follow.

Appendix B

In its motion, Defendant asserts that Plaintiffs' claims are barred by the *Feres* doctrine[1] based on the fact that the decedent, Captain James Lemp, was an Army officer at the time the alleged medical negligence occurred for which Plaintiffs seek judicial relief. The alleged medical negligence took place in a military hospital where Captain Lemp went for treatment while on active duty.

The *Feres* doctrine applies if the serviceman's injury was incident to military service, *See United States v. Johnson,* 481 U.S. 681, 691 (1987). A court must examine the totality of the circumstances to determine whether a serviceman's injury was incident to military service. *See Parker v. United States,* 611 F.2d 1007, 1013 (5th Cir. 1980), including consideration of: (1) the serviceman's duty status; (2) the site of his injury; and (3) the activity he was performing. *Id.* at 1013-15. Court's consider the serviceman's duty status as the most important factor because it indicates the nature of the nexus between the serviceman and the Government at the time of injury. *See Adams v. United States,* 728 F.2d 736, 739 (5th Cir. 1984). Indeed, duty status may be dispositive; *Feres* applies to a serviceman who is on active duty and has active status. *See Jones v. United States,* 729 F.2d 326, 328 (5th Cir. 1984); *Adams,* 728 F.2d at 739; *Schoemer v. United States* 59 F.3d 26, 28-9 (5th Cir. 1995).

Plaintiffs concede in Paragraph 9.1 of their Complaint that their claims are barred by *Feres* doctrine, but seek to challenge that decision based upon Justice Scalia's dissent in *Johnson.* 481 U.S. at 692-703. Case-law precedent

---

1. *Feres v. United States,* 340 U.S. 135 (1950).

following *Feres* and *Johnson*, however, continues to bar recovery by active military personnel who suffer injuries arising "incident to" their military service. *See, e.g. Schoemer*, 59 F.3d 28-9; *Hayes v. United States*, 44 F.3d 377, 378-9 (5th Cir. 1995). This Court is bound by such precedent and shall follow it. For this reason, Plaintiffs' claims shall be dismissed.

Plaintiffs request the opportunity to conduct discovery on this issue of whether the alleged negligence was incident to Captain Lemp's military service. The Court's review of the complaint, answer, and response to Defendant's motion, however, clearly reveal that Captain Lemp was on active duty with the military at the time he received the alleged treatment at issue in this cause. Therefore, this Court finds that discovery is unwarranted, and the Court declines to allow Plaintiffs' request.

IT IS THEREFORE ORDERED that Defendant United States of America's Motion to Dismiss pursuant to Rule 12(b)(1) and (b)(6) of the Federal Rules of Civil Procedure filed January 27, 2005 (Doc, #2) is **GRANTED.** Plaintiffs' claims are **DISMISSED WITH PREJUDICE.**

SIGNED this 28th day of February, 2005.

s/ Lee Yeakel
LEE YEAKEL
UNITED STATES DISTRICT JUDGE